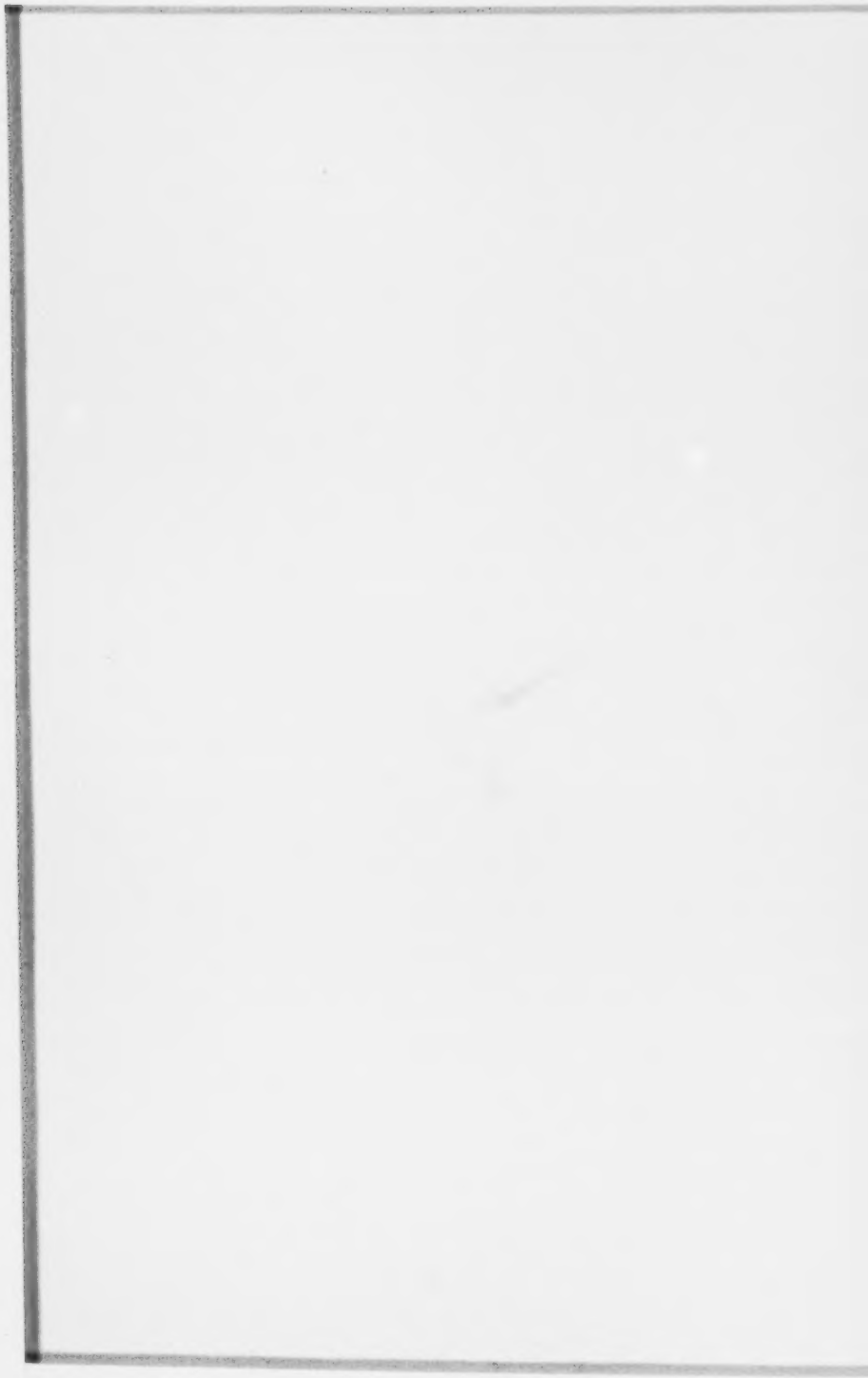

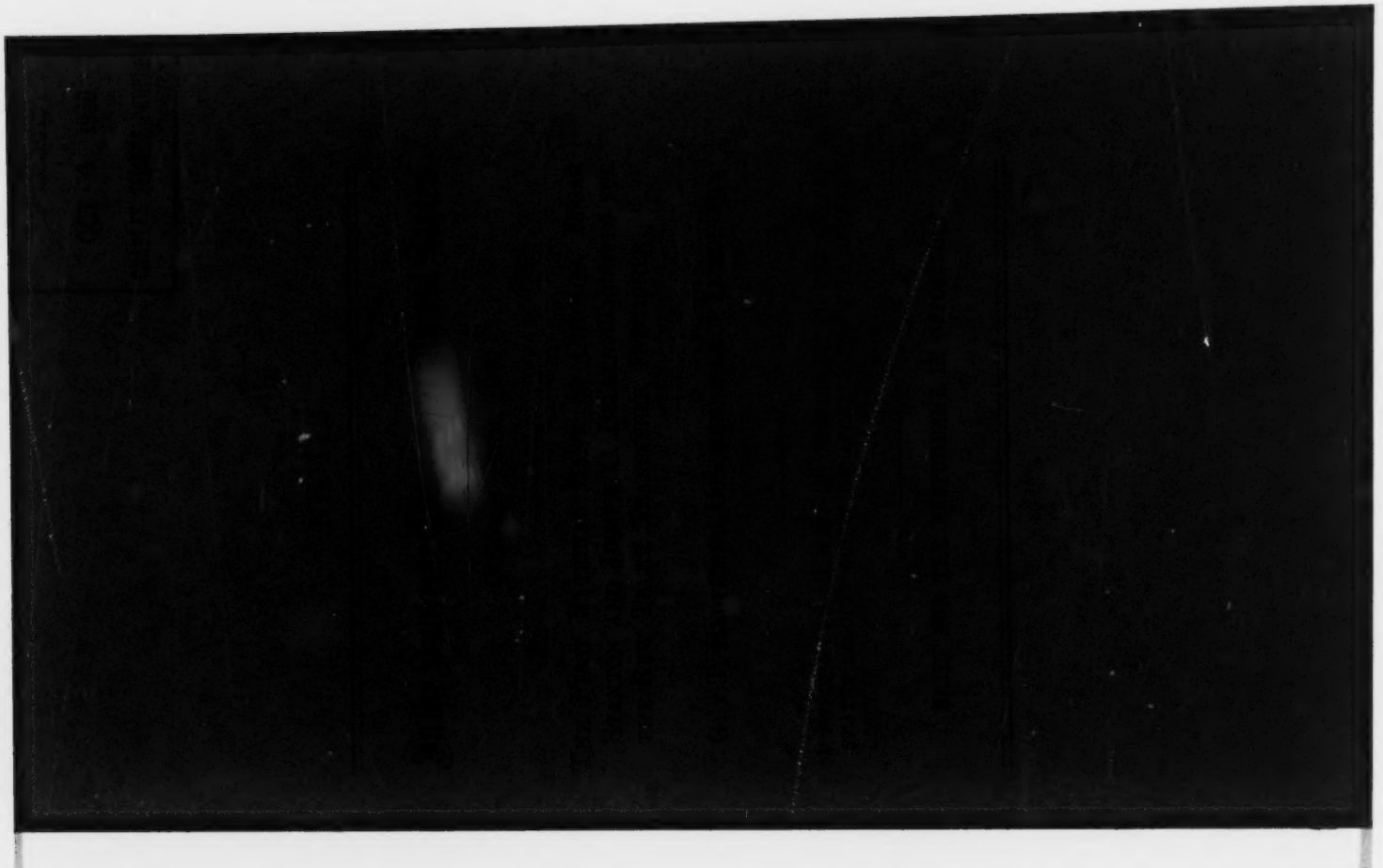

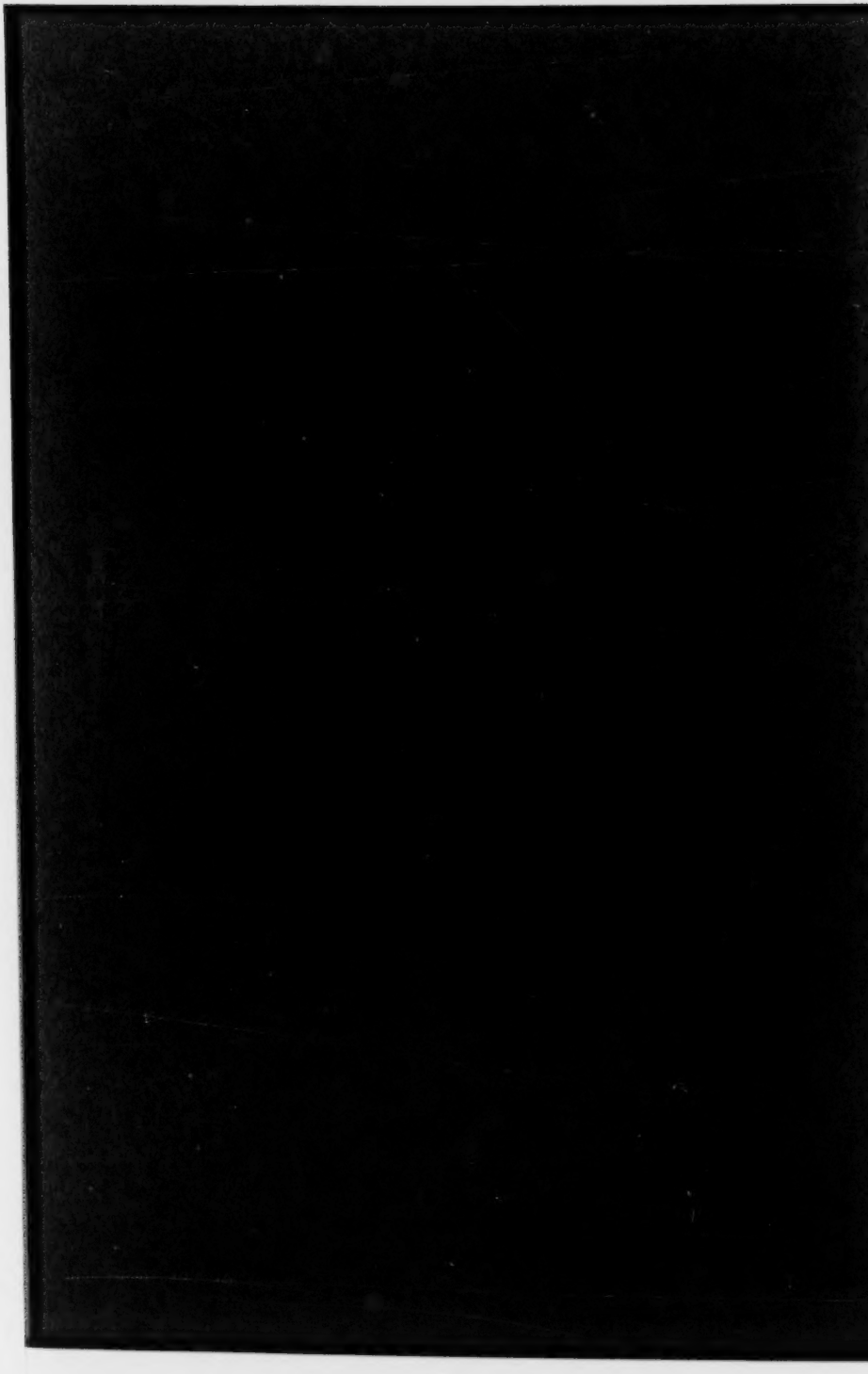

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 412

THE FIRST NATIONAL BANK OF CHICAGO, EDGAR STANTON AND JOSEPH C. BELDEN, TRUSTEES FOR THE REW TRUST, TRANSFEREE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 73–80) is unreported. The opinion of the Circuit Court of Appeals (R. 95–100) is reported in 112 F. (2d) 260.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 13, 1940 (R. 101). A petition for rehearing was denied June 11, 1940 (R. 113).

The petition for a writ of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the liability asserted against the petitioners as transferees of the deceased taxpayer for an income tax deficiency for the last period of his life was barred by limitation, or whether the running of the statute of limitations was suspended by a prior proceeding instituted by the decedent's executors in respect of that deficiency.

2. Whether the petitioners, as transferees of the assets of decedent, are liable for the unpaid deficiency determined in the prior proceeding instituted by the executors.

STATUTES INVOLVED

The pertinent provisions of the statutes involved will be found in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts found by the Board of Tax Appeals (R. 73–75) may be summarized as follows:

On March 10, 1924, George Campbell Rew created "The Rew Trust," with himself as trustee, to which he transferred all of his assets and under which he reserved the income to himself for life and retained unlimited power of revocation. He received no consideration for the transfer and as a result thereof he, as well as his estate after his

death, was left without assets with which to satisfy the tax liability here involved (R. 75).

Rew died testate on June 10, 1924, and his executors, Edgar Stanton and Joseph C. Belden, on or about October 8, 1924, filed a federal income tax return on his behalf for the period of January 1 to June 10, 1924. On September 11, 1928, a notice of deficiency of $75,539.72 in income tax for that period was mailed to the executors, who, on November 10, 1928, filed with the Board of Tax Appeals a petition for redetermination of the deficiency. The Board, on April 28, 1936, promulgated its findings of fact and opinion (34 B. T. A. 451), and pursuant thereto, on June 5, 1936, entered a decision that there was a deficiency for that period in the amount of $75,478.47. The executors thereafter filed a petition for review with the Circuit Court of Appeals for the Seventh Circuit, which on July 28, 1938, affirmed (98 F. (2d) 739) the decision of the Board. The executors then filed a petition for a writ of certiorari, which was denied by this Court on December 5, 1938 (305 U. S. 650) (R. 73–74).

The deficiency of $75,478.47, with interest, determined by the Board, was assessed against the executors on September 18, 1936, but has never been paid (R. 74).

On June 23, 1937, a notice of deficiency (R. 7–9) was sent to the First National Bank of Chicago, trustee for the Rew Trust, proposing to assess the deficiency of $75,478.47, with interest, in the in-

come tax of the decedent for the period of January 1 to June 10, 1924, against that trust as transferee of the assets of the deceased taxpayer (R. 74–75).

The value of the property in the Rew Trust has at all times exceeded the amount of the tax liability and interest in question (R. 75).

The petitioners, the present trustees of the Rew Trust, appealed to the Board of Tax Appeals, which, holding that the decision as to the deficiency on the merits in the prior proceeding was conclusive and that the assertion of transferee liability was not barred by limitation, sustained the deficiency against them as transferees (R. 73–80). The decision of the Board was affirmed by the court below (R. 95–100).

ARGUMENT

1. Under Section 277 (a) (2) of the Revenue Act of 1926, the taxes in question could be assessed against the taxpayer within four years after the filing of the return, and under Section 280 (c) the period of limitations remains the same notwithstanding the death of the taxpayer. Since the return in this case was filed October 8, 1924 (R. 74), and since the Commissioner's notice of deficiency was mailed to the executors on September 11, 1928 (R. 74), it is plain that that notice was timely. The executors thereupon sought review of the Commissioner's determination in the Board of Tax

Appeals, and under Section 277 (b), as amended, the running of the period of limitations for assessment was automatically suspended until the decision of the Board became final and for 60 days thereafter. The decision of the Board became final on December 5, 1938, so that the running of the unexpired portion of the period of limitations against assessment was suspended until 60 days thereafter.

The petitioners herein, however, are transferees, and Section 280 (b) (1) extends the period of limitations for assessment against a transferee "one year after the expiration of the period of limitation for assessment against the taxpayer." But the Commissioner's notice of deficiency to the petitioners was sent on June 23, 1937, long before the expiration of the period of limitations, as suspended by Section 277 (b) and as extended by Section 280 (b) (1).

The holding of the court below that the Commissioner's action was timely, scrupulously followed the applicable statutory provisions, and was in accord with judicial decision. *Sanborn* v. *Helvering,* 108 F. (2d) 311 (C. C. A. 8th).[1]

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[1] See also *American Equitable Assur. Co. of New York* v. *Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434 (C. C. A. 1st); *Parker* v. *Commissioner*, 30 B. T. A. 342, affirmed, 84 F. (2d) 838 (C. C. A. 8th); *U S L Battery Corp.* v. *Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593; *Hoosac Mills Corp.* v.

2. The petition is based chiefly upon the unwarranted assumption that the decision below rests upon some novel provision of federal taxing law contained in Section 281 (a) of the Revenue Act of 1926,[2] which, not enacted until after decedent's death, is variously asserted to be inapplicable here. (Pet. 2–3, 7–10, 11–12, 14, 15, 18–23.) The real basis of the decision of the court below, however, is that (R. 97–98) the prior proceeding instituted before the Board by the executors as representatives of the decedent, in respect of a deficiency in tax upon the income of the decedent, suspended the running of the statute of limitations just as much as a proceeding instituted by the decedent himself would have done (cf. R. 77–79). The reference in the opinion below (R. 96, 97) to Section 281 (a) was merely illustrative of the settled principle that an executor takes the place of the decedent. Entirely without regard to the provisions of Section

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Commissioner, 75 F. (2d) 462 (C. C. A. 1st); *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.); *Commissioner* v. *Gerard*, 78 F. (2d) 485 (C. C. A. 9th), and *California Iron Yards Corp.* v. *Commissioner*, 82 F. (2d) 776 (C. C. A. 9th), certiorari denied, 299 U. S. 553.

[2] SEC. 281(a) provides: Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated."

281 (a), executors have the right to litigate a liability of the decedent as his personal representatives, and the executors of Rew—who are two of the present petitioners [3]—did so in this case. The only new provision added by Section 281 (a) is the requirement of a notice of termination of the fiduciary capacity before the executors can be relieved of liability, even though they might have been discharged as executors (see *Sanborn* v. *Helvering*, 108 F. (2d) 311 (C. C. A. 8th); cf. *Hulburd* v. *Commissioner*, 296 U. S. 300, and *Olsen* v. *Helvering*, 88 F. (2d) 650 (C. C. A. 2d)), and the decision below does not rest on that new provision.

Liberman's Committee v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), deals with that requirement, imposed by Section 281 (a), relating to notice of termination of fiduciary capacity, to relieve the fiduciary of liability. Hence, the holding there that the requirement of notice of termination cannot be applied retroactively to a relation terminated before the enactment of that provision is obviously not in conflict, as urged (Pet. 8–9), with the deci-

[3] At least those two petitioners are hardly in a position to take advantage here of the delay which they themselves occasioned by their prior appeal to the Board. Cf. *Buzard* v. *Helvering*, 77 F. (2d) 391, 396 (App. D. C.); *Haag* v. *Commissioner*, 59 F. (2d) 516, 518 (C. C. A. 7th); *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34, 35 (C. C. A. 6th); *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123, 127 (C. C. A. 9th); *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434, 435 (C. C. A. 1st).

sion below, which does not involve any termination of fiduciary capacity.

Nor is the decision below in conflict, as asserted (Pet. 10–11), with *Commissioner* v. *Krug,* 78 F. (2d) 57 (C. C. A. 9th). The holding in that case that a previous defective appeal to the Board did not suspend the running of the statute of limitations is clearly distinguishable from the present case. There, the proposed deficiency from which the prior appeal had been taken was *another* deficiency, different from the deficiency sought to be enforced against transferee Krug, and the prior appeal had been taken by another person not in privity with the original taxpayer or transferee Krug. The prior appeal to the Board in the instant case was not, as in the *Krug* case, by a separate taxpaying entity, separate from the taxpayer-transferor, but by the executors as representative of the taxpayer himself, in respect of a deficiency in tax against the taxpayer, with whom they were in privity, which is the same deficiency as the one sought to be enforced against the petitioners as transferees of the taxpayer. Hence, it is obvious that the decision below is not in conflict, as claimed (Pet. 9–10), with the statement made by this Court in *Hartley* v. *Commissioner,* 295 U. S. 216, that the estate is a taxpaying entity separate from the taxpayer. That statement refers to the estate's lia-

bility for taxes on income received after the death of the decedent, as distinguished from the liability in respect of taxes of the decedent during his life.

3. Since the petitioners received as gratituous transferees property of a value in excess of the tax liability of the taxpayer-transferor, the transfer of which left the taxpayer-transferor, or his estate, without assets out of which the tax could be paid, the Board and the court below correctly held the petitioners liable for the tax as transferees. *Phillips* v. *Commissioner,* 283 U. S. 589; *Sanborn* v. *Helvering,* 108 F. (2d) 311 (C. C. A. 8th). They were properly held liable for the amount of the tax determined in the prior proceeding instituted by the executors of the taxpayer-transferor, just as they would have been if the prior proceeding had been instituted by the taxpayer himself. *In re Wolf Mfg. Industries,* 56 F. (2d) 64 (C. C. A. 7th); *Jahncke Service, Inc.* v. *Commissioner,* 20 B. T. A. 837, appeal dismissed (C. C. A. 5th), February 10, 1933; *California Iron Yards Corp.* v. *Commissioner,* 82 F. (2d) 776 (C. C. A. 9th), certiorari denied, 299 U. S. 553; *Sanborn* v. *Helvering, supra.* The prior decision on the merits was conclusive as to all matters decided or which might have been decided. Cf. *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK,
Assistant Attorney General.
J. LOUIS MONARCH,
HARRY MARSELLI,
Special Assistants to the Attorney General.

OCTOBER 1940.